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NOT FOR CITATION

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UNITED STATES DISTRICT COURT

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NORTHERN DISTRICT OF CALIFORNIA

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SAN JOSE DIVISION

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12 FELTON A. SPEARS, JR. and SIDNEY
13 SCHOLL, on behalf of themselves and all
14 others similarly situated,

15 Plaintiffs,

16 v.

17 FIRST AMERICAN EAPPRAISEIT (a/k/a
18 eAppraiseIT, LLC), a Delaware limited
liability company,

Defendant.

Case No. 5:08-cv-00868 RMW (HRL)

**ORDER RE DISCOVERY DISPUTE
JOINT REPORT NO. 6**

[Re: Docket No. 347]

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Plaintiffs sue for themselves and on behalf of a certified class of “[a]ll consumers in California and throughout the United States who, on or after June 1, 2006, received home loans from Washington Mutual Bank, FA in connection with appraisals that were obtained through eAppraiseIT.” They claim that defendants engaged in a scheme to inflate the appraised values of homes receiving loans in order to sell the aggregated security interests at inflated prices. First American EAppraiseIT (EA) is the only defendant left. Plaintiffs’ sole remaining claim for relief is that the complained-of conduct violates the anti-kickback provision of the Real Estate Settlement Practices Act (RESPA), 12 U.S.C. § 2607(a).

In Discovery Dispute Joint Report (DDJR) No. 6, plaintiffs seek an order compelling EA to produce documents responsive to document requests 1, 2, 4-9, 13 and 14 in their sixth set of

1 requests for production. The matter is deemed suitable for determination without oral argument.
2 Civ. L.R. 7-1(b). Upon consideration of the parties' respective positions, the court grants in part
3 and denies in part plaintiffs' requested discovery.

4 **A. Document Request 1**

5 This request seeks “[a] copy of each and every prior sworn statement regarding the
6 appraisal process or EA's relationship with WaMu in a deposition, at trial, by declaration or
7 affidavit since May 1, 2007 by any current or former employee or agent of EA.” (DDJR 6, Ex. 1).
8 Pointing out that it is an appraisal management company, EA objects that this request, as drafted,
9 is overbroad and encompasses any sworn statement ever given by a current or former EA
10 employee. Additionally, EA says that it has already produced transcripts of testimony and that
11 plaintiffs have other sources from which it may already have received responsive documents---
12 namely, (1) the New York Attorney General's Office with whom, this court is told, plaintiffs
13 assert a “joint prosecution” relationship; and (2) seven non-parties that plaintiffs subpoenaed for
14 transcripts of sworn testimony related to appraisals.

15 Nevertheless, EA says it is willing to provide a further response to Document Request 1 on
16 two conditions. First, EA wants plaintiffs to provide a list of sworn statements of current and
17 former EA employees that are already in plaintiffs' possession. Here, defendant expresses
18 concern that plaintiffs may well be asking for documents that they already have.¹ This is entirely
19 reasonable and a task that plaintiffs are willing to undertake.

20 EA's second condition appears to be the sticking point and the one that prompted the
21 parties to bring the matter before this court. EA wants plaintiffs to be responsible for securing any
22 releases or authorization for production under applicable protective orders. Plaintiffs declined,
23 stating that they first need to review the applicable protective orders to determine (1) the specific
24 requirements of each order and (2) in cases where EA is a party and plaintiffs are not, whether
25 plaintiffs have standing to obtain the appropriate releases or authorizations. Insofar as plaintiffs
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27 ¹ EA asserts, and plaintiffs do not deny, that during the deposition of EA's former president, Tony
28 Merlo, plaintiffs' counsel said that plaintiffs did not have Merlo's deposition transcript from the
New York Attorney General's action against EA. However, later in the deposition, plaintiffs'
counsel introduced that very transcript as an exhibit.

1 are seeking disclosure of the information, they ought to take the laboring oar at securing the
2 requisite releases. Nevertheless, at a minimum, EA should provide the applicable protective
3 orders so that plaintiffs can evaluate what they need to do in order to secure the appropriate
4 authorization for production of the documents. To the extent the protective orders in question
5 require EA's participation in securing the release of any protected documents, this court expects
6 EA to cooperate in good faith.

7 Subject to the conditions and guidelines discussed above, plaintiffs' request for an order
8 compelling a further response to Document Request 1 is granted.

9 **B. Document Requests 2 and 13**

10 Requests 2 and 13 seek “[a] copy of any job descriptions, performance reviews, and
11 descriptions of any compensation or bonuses being based on performance,” as well as “all
12 documents reflecting the cessation of employment at EA and the reasons therefor” for the
13 following individuals: Anthony Merlo, Donald Dobson, David Feldman, Vicky Hamilton, Rose
14 Lusk, Peter Gailitis, Mary Ann Garfield, Sue Ramey, Tom Bickman, Ray Bono, Teresa Cosie,
15 Phillip Etnyre, Stacey Harris, Jo Hartman, Susan Lorrain, Kent Serviss, and Robert Tavener.”
16 (DDJR 6, Ex. 1).

17 Plaintiffs argue that the information is relevant to show the duties and basis for
18 compensation for individuals who managed EA's business with respect to Washington Mutual.
19 That is, plaintiffs believe the requested discovery might show whether compensation was tied, not
20 to legitimate business interests, but to volume of business or to hitting values WaMu wanted.
21 Additionally, plaintiffs want to know whether any of these individuals were fired or removed from
22 their positions at EA because of the New York Attorney General's investigation of EA, as well as
23 the New York Attorney General's suit (and the instant lawsuit) which allege that these individuals
24 were involved in an agreement with WaMu to inflate appraisal values. EA says that, in response
25 to another request, it has already produced documents concerning the reasons for the departure of
26 Anthony Merlo as CEO of EA (and that plaintiffs never complained about the sufficiency of
27 defendant's production). In any event, EA maintains that plaintiffs have not offered sufficient
28 justification for the burden imposed by these requests.

1 Plaintiffs' request for this information is granted in part. Although privacy interests may
2 be invaded for litigation purposes, courts must balance a claimed privacy right against the need for
3 the information. Ragge v. MCA/Universal Studios, 165 F.R.D. 601, 604 (C.D. Cal. 1995). The
4 requests, as drafted, seek far broader discovery than the justification offered by plaintiffs.
5 Nevertheless, the court finds that they encompass documents that are relevant or reasonably
6 calculated to lead to the discovery of admissible evidence under Fed. R. Civ. P. 26. There is also a
7 protective order in place to address any confidentiality concerns. Having weighed competing
8 legitimate interests and possible prejudice, the court finds that some discovery should be
9 permitted. EA, however, will only be required to produce documents sufficient to show (1) the
10 basis for these individuals' compensation; and (2) the reason(s) for the end of their employment
11 with EA (except that EA will not be required to produce such documents in this second category
12 for Merlo). Plaintiffs' request for an order compelling discovery responsive to these requests is
13 otherwise denied.

14 **C. Document Requests 4-7**

15 These requests seek various ROV (reconsideration of value) reports and related
16 documents:

17 Request 4: "ROV change reports for the duration of the relationship between EA and
18 WaMu as well as emails attaching or discussion [sic] any such reports. *See, e.g.* EA-
19 Spears0925803-18."

20 Request 5: "All ROV summary reports for the duration of the relationship between EA
21 and WaMu, as well as emails attaching or discussing such reports, with the exception of those
22 produced at [specified Bates numbers]."

23 Request 6: "WaMu Low Value Summary Reports for the duration of the relationship
24 between EA and WaMu, as well as emails attaching or discussing such reports, with the exception
25 of those produced at [specified Bates numbers]."

26 Request 7: "ROV Missed Value Summary reports or ROV analyses similar to what
27 was produced at EASpears0403216-0403227, as well as emails attaching or discussing any such
28 reports from December 2006 forward."

1 (DDJR 6, Ex. 1).

2 According to plaintiffs, the ROV was one way Washington Mutual would get EA to
3 increase property appraisal values. EA argues that these requests are duplicative and abusive
4 because the requested reports are encompassed by plaintiffs' Document Request 54, which this
5 court is told, sought "all versions" of seventeen different types of reports. Additionally, defendant
6 says that the requests themselves list around 60 unique and responsive documents that have
7 already been produced. Plaintiffs' rejoinder is that defendant's prior production included
8 incomplete sets of the requested reports. But, their assertion is made in highly conclusory fashion,
9 without explanation as to why they believe defendant's prior production allegedly was incomplete.
10 Nor is it clear how requests seeking more of the same kind of reports will cure the claimed
11 deficiency in EA's prior production. Plaintiffs' request to compel production of documents
12 responsive to these requests is denied. Fed. R. Civ. P. 26(b)(2)(C).

13 **D. Request 8**

14 This request seeks "[d]ocuments reflecting the monthly revenue received by EA from
15 WaMu [sic] the work EA performed as a result of Project Cornerstone between January 1, 2006
16 and December 31, 2007." (DDJR 6, Ex. 1). Plaintiffs contend that this discovery is relevant to
17 show how much Washington Mutual paid EA for appraisal services, "including whether it was
18 paid more than the value of the appraisals themselves in exchange for its willingness to inflate
19 appraisals." (DDJR 6 at 4). EA argues that this "overpayment" theory has never before been
20 articulated and is at odds with plaintiffs' theory espoused in their Second Amended Complaint and
21 through class certification that, in exchange for a significant portion of Washington Mutual's
22 business, EA allegedly inflated appraisals to support the value of loans Washington Mutual
23 wanted to issue. Whatever else it might show, the requested discovery is relevant or reasonably
24 calculated to lead to discovery of admissible evidence of plaintiffs' theory that EA obtained a
25 significant portion of Washington Mutual's business. Plaintiffs' request for an order compelling
26 this discovery is granted.

27 **E. Request 9**

28 This request seeks various specified trial exhibits from *The People of the State of New York*

1 *v. First American Corp., et al.*, New York Supreme Court. (DDJR 6, Ex. 1). Although plaintiffs
2 claim that they have not been able to locate the listed exhibits among EA's document production,
3 EA says that it has already produced at least the first seven exhibits listed in Request 9 and
4 suggests that plaintiffs could obtain the full set of exhibits pursuant to their claimed "joint
5 prosecution" relationship with the New York Attorney General. To the extent EA has in its
6 possession, custody, or control any responsive exhibits that it has not already produced, EA shall
7 produce them to plaintiffs. EA need not re-produce exhibits it has already given plaintiffs. Nor
8 will this court require EA to run document production database searches to provide Bates numbers
9 for previously produced documents.

10 **F. Request 14**

11 This request asks EA to "[p]roduce all documents identified in your answer to Plaintiffs'
12 Second Set of Interrogatories to Defendant." (DDJR 5, Ex. 1). This court having denied
13 plaintiffs' request for an order compelling EA to answer those interrogatories, plaintiffs' request to
14 compel documents responsive to this request is denied.

15 **ORDER**

16 Based on the foregoing, plaintiffs' request for discovery is granted in part and denied in
17 part. To the extent EA has been ordered to produce documents, it shall do so no later than
18 **January 10, 2014**. However, EA will not be required to produce documents responsive to
19 Request 1 by that date if the necessary releases or authorizations for production have not yet been
20 obtained.

21 **SO ORDERED.**

22 Dated: December 20, 2013



23 _____
24 HOWARD R. LLOYD
25 UNITED STATES MAGISTRATE JUDGE

1 5:08-cv-00868-RMW Notice has been electronically mailed to:

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